

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

DEC 19 2000

PATRICK FISHER
Clerk

BRIAN P. CALCARI,

Petitioner-Appellant,

v.

JOHN W. SUTHERS, Executive
Director; ATTORNEY GENERAL OF
THE STATE OF COLORADO,

Respondents-Appellees.

No. 00-1304
(D.C. No. 00-M-350)
(D. Colo.)

ORDER AND JUDGMENT*

Before **SEYMOUR**, Chief Judge, **EBEL** and **BRISCOE**, Circuit Judges.

Brian P. Calcari is serving a 24-year sentence in Colorado state prison. He brought this petition for habeas corpus under 28 U.S.C. § 2254, raising four issues: (1) his waiver of a jury trial was invalid; (2) insufficiency of the evidence; and (3 and 4) his statements to police should have been suppressed. It appears that

*After examining appellant's brief and the appellate record, this panel has determined unanimously that oral argument would not materially assist the determination of this appeal. See Fed. R. App. P. 34(a)(2) and 10th Cir. R. 34.1(G). The case is therefore ordered submitted without oral argument. This Order and Judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. The court generally disfavors the citation of orders and judgments; nevertheless, an order and judgment may be cited under the terms and conditions of 10th Cir. R. 36.3.

all of these issues were raised in the Colorado Court of Appeals on direct appeal. Only the first issue was raised in his petition for a writ of certiorari before the Colorado Supreme Court, however. Calcari has not filed for post-conviction relief in the state courts.

The district court found that Calcari failed to exhaust state remedies on three of the issues under the rule of O'Sullivan v. Boerckel, 526 U.S. 838, 119 S. Ct. 1728, 144 L. Ed. 2d 1 (1999), which requires a petitioner to seek certiorari when it is available. The court therefore dismissed Calcari's petition without prejudice under Rose v. Lundy, 455 U.S. 509, 102 S. Ct. 1198, 71 L. Ed. 2d 379 (1982), because it contained both exhausted and unexhausted claims. The court denied Calcari's request for a certificate of appealability and leave to proceed on appeal in forma pauperis.

Without a certificate of appealability, we lack jurisdiction over this appeal. See 28 U.S.C. § 2253(c). For substantially the reasons stated by the district court, we deny a certificate of appealability. Calcari asserts ineffective assistance of appellate counsel for his failure to seek certiorari on all the issues. The Colorado courts appear to entertain such issues in post-conviction proceedings. See, e.g., People v. Valdez, 789 P.2d 406, 407 (Colo. 1990) (en banc). Calcari must therefore raise his ineffective-assistance issue there before bringing it to federal court.

We also deny Calcari's motion for leave to proceed on appeal without prepayment of costs for substantially the reasons stated by the district court. Given our disposition of this case, we need not review Calcari's appeal of the district court's refusal to appoint counsel.

For the foregoing reasons, we DISMISS this appeal for lack of jurisdiction.

ENTERED FOR THE COURT

David M. Ebel
Circuit Judge